

CHAPTER V

COMPETITION ADVOCACY

In addition to enforcing the antitrust laws, the Antitrust Division also acts as an advocate for competition, seeking to promote competition in sectors of the economy that are or may be subject to government regulation. This Chapter will set forth the major policies and practices of the Division in these competition advocacy activities.

A. The Division's Role as a Competition Advocate

Competition is the central organizing principle of the American economy and its preservation and promotion are the goals toward which the Antitrust Division's efforts are directed. In most sectors, market forces are the regulators of business activities, subject only to the restrictions of the antitrust laws. There are, however, important exceptions in such major industries as communications, banking, agriculture, securities, transportation, energy and international trade, where federal regulation--sometimes accompanied by antitrust immunity--has been wholly or partially substituted for the discipline of market forces as the arbiter of output and pricing decisions.

In addition to these federally regulated industries, economic regulation at the state or local level affects other industries. Some significant examples include professional and occupational licensing, insurance, housing, health care, public utilities, certain aspects of banking, and real estate. Although most of its efforts focus on federal regulatory schemes, the Division also occasionally advocates the elimination of unnecessary anticompetitive state regulation.

1. The Division's Analytical Model

Many regulatory schemes are products of the Depression years, reflecting economic assumptions and conditions that are not valid today. Moreover, regulation can be an imperfect and very costly substitute for "regulation" by market forces. Accordingly, exceptions to the general rule of free market competition, protected by antitrust enforcement, should be permitted only on compelling evidence that competition cannot work or is inimical to some overriding social objective.¹ Through its program of competition advocacy, the Division seeks to further four goals:

1. To eliminate unnecessary and costly existing regulation;

¹ In deregulating industries, competition advocacy is particularly important; procompetitive regulation may play a critical role in a transition from monopoly to competition. Skillful regulation in transitions to competition can help determine whether competition will be able to flourish.

2. To inhibit the growth of unnecessary new regulation;
3. To minimize the competitive distortions caused where regulation is necessary by advocating the least anticompetitive form of regulation consistent with the valid regulatory objectives; and
4. To ensure that regulation is properly designed to accomplish legitimate regulatory objectives.

In analyzing the need for new or continued regulation, the Division attempts to focus attention on the comparative benefits of free competition, on the one hand, and the proposed method of regulation, on the other, by asking several basic questions:

1. What are the costs or disadvantages of free competition in the market or industry at issue?
2. If the regulatory scheme is an existing one, has regulation fulfilled its purpose; and, do the underlying economic and social conditions justifying regulatory interference with the marketplace still exist?
3. What are the costs and benefits associated with the existing or proposed regulatory scheme?²
4. If existing regulation is to be eliminated, what are the necessary elements of a transition from regulated to a competitive, unregulated market?
5. If regulation is appropriate, is the particular regulatory scheme well-tailored to achieve its purpose?

Asking these questions requires that those who favor regulation demonstrate that the benefits to the public of regulation outweigh its anticompetitive effects; that such benefits cannot be achieved by some less anticompetitive alternative; and that, where regulation is needed, it be wisely crafted to accomplish its objectives with no unintended consequences. Where these showings cannot be made, the case for regulatory reform, up to and possibly including the

² Alfred Kahn, who successfully presided over the deregulation of the airline industry as Chairman of the CAB, suggested that a cost/benefit examination of a regulated market should focus on the degree to which innovation is stifled, whether the monopoly value of regulatory restraints and immunized collective action has been capitalized into the high cost of entry licenses, whether industry customers seek to eliminate regulation, whether input prices are inflated and a comparison, if possible, of the regulated industry with an unregulated market. See National Commission for the Review of Antitrust Laws and Procedures, Report to the President and the Attorney General 188 (1979).

elimination of regulation, is compelling.

2. The Methodology of Competition Advocacy

The Antitrust Division conducts its program of competition advocacy through a collaboration between the economists in the Division's Economic Analysis Group ("EAG") and the attorneys in those of its sections with expertise in various regulated industries: Computers and Finance; Transportation, Energy, and Agriculture; Health Care Task Force; Telecommunications Task Force; and Foreign Commerce. The means employed to pursue the Division's goals include participation on Executive Branch policy-making task forces, preparation of testimony on a wide variety of legislative initiatives, publication of reports on regulated industry performance, review of proposed licensing and leasing applications, and intervention in regulatory agency proceedings.

a. Activities within the Executive Branch

The Division's activities within the Executive Branch have included, for example, its ongoing participation in White House and interagency task forces dealing with a variety of regulatory issues arising in areas such as telecommunications, intellectual property, ocean shipping, energy and export policy. Whether by informal advice or formal comment, the Department of Justice's role in this regard is to advise the President and other government agencies regarding the competitive impact of proposed policy, legislation and agency action.

b. Testimony on Legislative Initiatives

Division officials routinely testify concerning the competitive impact of proposed legislation. Such testimony may support legislation designed to reduce or eliminate unnecessary economic regulation or require regulatory agencies to consider competition in their evaluation of the need for new or continued regulation. It may also oppose efforts to extend regulation to previously unregulated markets.

c. Publication of Reports on Industry Performance

The Division has authored a number of in-depth studies of the competitive performance of various regulated industries including insurance, milk marketing, ocean shipping, and numerous energy industries.³ The purpose of such reports was to create greater public

³ See, e.g., Competition in the Oil Pipeline Industry: A Preliminary Report (1984); Competition in the Coal Industry (1983); Antitrust Advice on the License Application of the Texas Deepwater Port Authority (1979) (pursuant to Section 7 of the Deepwater Port Act of 1974); Outer Continental Shelf Federal/State Beaufort Sea Oil and Gas Lease Sale No. BF (1980); 1985 Report of the Department of Justice to Congress on the Airline Computer Reservation System Industry (1985).

awareness of the costs of regulation and thereby to advance reform efforts.

d. Intervention in Regulatory Agency Proceedings

The Division's major competition advocacy effort involves submitting comments and intervening in the proceedings of federal regulatory agencies in an effort to focus attention on competitive issues and to suggest adoption of the least anticompetitive and best designed forms of regulation where continued regulation is deemed necessary.

In the communications area, for example, supported by EAG, the Telecommunications Task Force ("TTF") participates in proceedings before the Federal Communications Commission. The Computers and Finance Section ("CAF") serves as a competition advocate in the banking, finance and securities industries, submitting comments to and appearing as necessary before such agencies as the Federal Reserve Board, Securities and Exchange Commission, and Commodity Futures Trading Commission.

The Division's Transportation, Energy, and Agriculture Section ("TEA") appears before or files comments with the Department of Transportation, the Federal Maritime Commission and the Surface Transportation Board on a wide variety of issues including proposed mergers and acquisitions, conference agreements, pooling agreements, rate bureau activities, various rulemakings and adjudicatory proceedings. TEA also participates, through comments, consultation or otherwise, in proceedings before the Federal Energy Regulatory Commission, the Nuclear Regulatory Commission, the Environmental Protection Agency and the Interior Department, on competitive issues raised by agency action concerning electricity, the interstate transmission of natural gas and other issues involving energy policy. And TEA participates in regulatory proceedings involving USDA marketing orders, which regulate the production of various agricultural commodities.

While the Division's competition advocacy cuts across a vast and diverse cross-section of industries in regulated sectors of the economy, the issues raised in regulatory proceedings tend to involve the same types of questions, e.g., whether competition is feasible, whether an industry is naturally monopolistic, whether cross-subsidies exist and, if so, whether they are desirable, whether economies of scale are substantial, whether domestic regulation inhibits U.S. firms from effectively competing against their foreign counterparts in foreign markets, and whether particular regulations are likely to accomplish their stated objectives.

e. Antitrust Review of Proposed Licensing and Leasing

The Antitrust Division, through the TEA Section, is called upon to review and comment upon the competitive effects of proposed licensing and leasing in the energy sector. TEA plays a significant role as a competition advocate through such review and comment.

Division comment and review is mandated by statute for the issuance of licenses for deepwater ports by the Department of Transportation, the issuance of licenses and operating

certificates for nuclear power plants by the Nuclear Regulatory Commission, the awarding or modification of federal coal leases by the Department of Interior and the awarding of outer continental shelf oil leases by the Department of Interior. In the case of nuclear power plant licensing, Division participation may take the form of actual participation in the licensing proceedings. For other licenses and leases, the Division files written comments with the awarding agency.

The Division's role in licensing and leasing proceedings ensures the procompetitive use of government-owned resources in the public interest.

f. Procedures for Filing Pleadings Before Federal Agencies

There are a number of means by which legal and/or economic sections may become aware of agency proceedings in which the Division should become involved. Primarily, each section should review the Federal Register and the trade press (e.g., Aviation Daily, Inside FERC) to identify important regulatory matters. At times, the Division may be invited by the agency to participate in rulemaking proceedings. Either the legal or economic staffs may lead the effort to develop appropriate pleadings, but both legal and economic staffs should be assigned to support the effort and assure that it makes an important contribution to the proceedings.

When preparing to file any pleading in a regulatory matter, the legal and economic staff should prepare a memorandum for the Assistant Attorney General ("AAG memo"). The AAG memo should set forth the nature of the regulatory matter, the reasons for becoming involved, the Division's role in the proceedings, and a summary of the position taken in the pleading. The AAG memo should also describe the Division's prior positions, if any are relevant. Unless the pleading is of a non-controversial nature, the AAG memo should be accompanied by a draft press release announcing the pleading. The press release should contain a concise description of the regulatory matter and the Division's position. An example may be found in Chapter VII.

Because most regulatory proceedings have short time limits, it is vital that the staff prepare pleadings promptly. No later than two weeks before the filing date, the relevant legal and economic Deputy Assistant Attorneys General should have received a copy of the AAG memo and the draft press release. The filing, in final form, must be received by the Deputy Assistant Attorneys General no later than one week before the filing deadline.

The legal and economic staff should be conscious of prohibitions on ex parte contacts with agencies. Many agencies' regulations prohibit any contact with outside parties, including the Department of Justice (e.g., Department of Transportation regulations, 14 C.F.R. § 300.2) and may require such contacts to be placed on the public record. Attorneys and economists should avoid any agency contacts that may violate these regulations. Economists should consult with the lead attorney before making any contacts.

g. Litigation Activities

The sections that are primarily concerned with competition advocacy in regulated industries also have the responsibility for enforcing the antitrust laws in these industries through litigation. Civil antitrust litigation can complement the Division's competition advocacy role. Cases under the Sherman or Clayton Acts can ensure that the regulatory scheme does not protect or vindicate a wider scope of anticompetitive activity than is necessary or intended. For example, the Division was successful in litigation to establish that mergers between ocean carriers were not subject to Federal Maritime Commission approval and antitrust immunity under Section 15 of the Shipping Act.

Competition advocacy goals are not relevant to decisions on whether to institute criminal prosecutions. In this area the Division's policy is guided by the same goals employed in the Division's general criminal enforcement policy and the factors enumerated in the Supreme Court's Gypsum opinion. See United States v. United States Gypsum Co., 438 U.S. 422 (1978).

Litigation activities are described generally in Chapter IV, supra. Litigation activities in regulated industries are reviewed by the appropriate Director of Enforcement, the appropriate Deputy Assistant Attorney General, and the Assistant Attorney General.

B. Procedures Affecting the Regulatory Sections

To ensure the consistent quality of the Division's advocacy before regulatory agencies and to coordinate its varied efforts, all regulatory filings by the Division's sections require review by the appropriate legal and economic Deputy Assistant Attorneys General.

Each pleading that commences the Division's participation in a regulatory proceeding, states the Department's position on the merits, or raises significant policy issues, is reviewed and signed by one of the supervising Deputy Assistant Attorneys General or, in some cases, by the Assistant Attorney General. Except for litigation matters, which first go through the appropriate Director of Enforcement, all memoranda, filings and reports should be transmitted directly from the section or task force Chief to the appropriate Deputy Assistant Attorneys General.

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While the competitive problems raised in regulated sectors of the economy are diverse on their facts and many in number, the Division's role in this area is a relatively simple one: to promote reliance on competition rather than on government regulation wherever possible under the circumstances and to ensure that necessary regulation is well designed to achieve its objectives. These goals should be reflected in the Division's competition advocacy efforts across the entire range of regulated industries.